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Reply Brief of Appellants.

REPLY BRIEF OF APPELLANTS.

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In The Supreme Court

OF THE

United States.

OCTOBER TERM, A. D. 1901.

TOMAS C. GUTIERRES, ET. AL.
Appellants.
vs.
ALBUQUERQUE LAND & IRRIGATION COMPANY.

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Counsel for Appellants.

CITIZEN PRINT, ALBUQUERQUE, N. M.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1901.

No. 85.

TOMAS C. GUTIERRES, ET. AL. Appellants

vs.

ALBUQUERQUE LAND & IRRIGATION CO.

REPLY BRIEF OF APPELLANTS.

I

This Court has Jurisdiction to Review this Case.

Counsel for appellee, attacking the jurisdiction of this court, says:

> "We respectfully submit that the treaty was not held invalid by the court below, and the power of the Legislative Assembly of New Mexico to enact the legislation involved in this case was sustained, and that 'no authority exercised under the United States' *by appellants* was denied or questioned by the court below." *(Brief p. 4.)*

This court, construing the section of the statute under which this case is brought here, said:

> "It will be observed that this second section of the statute, while it is based upon the general principle which is found in the act of Con-

> gress allowing writs of error from this court to the highest courts of a State, namely, to protect parties against the exercise of an unlawful power on the part of the State authorities, does not use the language which is found in that act, that to give this court jurisdiction the decision of the State court must be AGAINST the right or power set up by the party under the laws of the United States. On the contrary, this peculiar feature of the appellate jurisdiction of this court over that of the State courts is left out when the matter comes to be applied to the Territories, and it is held sufficient that there should be drawn 'in question the validity of a treaty or statute of or authority exercised under the United States'; and it is not required that the decision of the State court should be against the validity of the treaty, statute or authority so exercised or claimed." (Clayton v Utah, *132 U. S. 637.)*

The "authority under the United States" which is called in question in this case is the authority of the Legislative Assembly of the Territory of New Mexico to pass the act under which appellee is incorporated. In the original brief filed on behalf of appellants, the contention is made that the right to carry water lies at the foundation of the right to construct the canal, and that the utility of the canal as a public agency depends upon the existence of the right to take the surplus waters from the Rio Grande, and that the right to construct the canal cannot exist independently of the right to divert and carry into and through it such waters. The nature of appellants' contention as to the want of power in the Territorial Legislature to pass the act in question appears to be misapprehended by counsel for appellee. Appellants call in question the power of the Legislature to pass Sub-section 4 of Section 17 of the act under which

appellee is organized, and contend that the portion of the act especially attacked is so vital in its character that the whole act must be declared void, if the power to pass this section is successfully challenged. Sub-section 4 is as follows:

> "To take and divert from any stream, lake or spring the surplus water, for the purpose of supplying the same to persons, to be used for the objects mentioned in section one of this act, but such corporations shall have no right to interfere with the rights of, or appropriate the property of any persons except upon the payment of the assessed value thereof, to be ascertained as in this act provided; And provided, further, That no water shall be diverted, if it will interfere with the reasonable requirements of any person or persons using or requiring the same, when so diverted." (*Laws of* 1887, *p.* 33.)

The courts below determined as matter of law that this power exists. Appellants challenge the correctness of that determination, and ask this court to review it. The conclusion of law presenting this question is as follows:

> "That the plaintiff, by the filing of its articles of incorporation with the Secretary of the Territory of New Mexico and complying with the provisions of the act under which it is incorporated, has acquired a right to construct its canals and reservoirs, to divert through its proposed canal surplus and unappropriated waters flowing in the Rio Grande, and that such right of eminent domain does not depend upon the ownership of lands by plaintiff or the employment of plaintiff prior to the construction of its canal by owners of lands to carry water for such owners." (*Transcript*, *p.* 36.)

The question thus presented is: Has the Territorial

Legislature authority to create a corporation and to authorize that corporation to make a valid appropriation of water which Congress has declared "shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes," without requiring that such corporation shall be the owner of lands to be irrigated or the agent of persons entitled to make beneficial use of the waters when diverted. Numerous decisions of this court support the contention that this raises what may be called for convenience a federal question.

But the validity of the treaty commonly known as the treaty of Guadalupe Hidalgo is also distinctly called in question in this case. Appellants rely upon certain rights which they allege are guaranteed to them and their predecessors in title, by the provisions of that treaty. But the court below found as matter of law:

> "That the defendants cannot lawfully set up in this action any rights secured to them and their associates or their predecessors in title by the treaty of Guadalupe Hidalgo and that the allegations of paragraph ten of the answer of the defendants with reference to the treaty rights of defendants—immaterial." *(Transcript, p.* 36.)

Looking to the opinion of the court for the reasoning by which this conclusion is supported, it distinctly appears that the courts below held the treaty to be invalid, i. e., legally ineffectual, as the basis of the rights relied on by the appellants. Those courts said:

> "The appropriation and distribution of water must be governed by similar laws, inasmuch as the United States has adopted its own system of water rights and adjusted the system to the different sections of the country as necessity required, and the laws of the States and Territories

> are in harmony therewith. These laws must govern wherein they differ from the treaty provisions, and wherein they are harmonious, treaty provisions need not be considered. The laws of the United States and the States and Territories are ample for the protecton of the rights of appropriators of water in this Territory, and remedies for impairment or destruction of such rights, are adequate also." (*Transcript, p.* 60.)

The validity of the treaty is therefore directly, and not incidentally, called into question.

Appellants respectfully submit that the jurisdiction of this court is not doubtful in view of its repeated decisions.

> *Maricopa R. R. v. Arizona*, 156 *U. S.* 347.
> *Clayton v. Utah*, 132 *U. S.* 632.
> *Lewis v. Pima County*, 155 *U. S.* 54.

II

The attempt to authorize the diversion of and sale as a commodity to whomever will buy, the surplus waters of the Rio Grande, interferes with the primary disposal of the soil and defeats the policy of Congress, as evidenced by its legislation.

Counsel for appellee in his brief says:

> "Whenever the title has passed, been conveyed by the sovereign, and the land has become private property, 'primary disposal of the soil has been made.' Thereafter any legislation relating thereto does not 'interfere with the primary disposal of the soil.'" (*Brief, p.* 4.)

Appellants without qualification assent to this proposition. They insist, however, that a law which attempts to vest in a private corporation waters which are essential to the irrigation of lands and without which the lands are valueless, interferes with the primary dis-

posal of those lands. They further insist that no legislation of Congress contemplates or sanctions the ownership or control of water for purposes of irrigation, by persons or corporations not the owners of the land to which the water is to be applied.

The entire subject of irrigation, the relation of water to land and of land to water, in the arid region, must be taken into consideration in order to determine the question here presented.

It is urged by counsel for appellee that no public lands are involved in this controversy, but it is not claimed that the right to control public waters is not thus involved.

Prof. Elwood Mead, the government expert on irrigation, in a recent bulletin issued by the Department of Agriculture, says:

> "Sooner than is generally realized the public or private ownership of Western rivers is destined to be one of the social and industrial questions of this country. *Their waters are worth more than the land public or private, through which they flow*, and the manner of their disposal will do more to shape Western civilization and promote or retard Western development than all other causes combined. The study of the duty of water is a study of the farmer's needs, and it is hoped that the presentation of these needs will tend to promote the creation of an irrigation system which will make the supplying of his necessities of first importance and be a matter of just pride to the nation." (*Bulletin No. 86, p. 46.*)

Appellants do not claim that the proposed canal of appellee crosses any portion of the public domain; indeed, the finding of the courts below is directly to the contrary. Those courts found:

XVIII.

"That some of the defendants and some of their associates are the owners of lands through which the plaintiff proposes to construct its canal." *Transcript, p.* 36.)

The contention is that the waters which appellee seeks to control belong either to the government of the United States or to appellants and their associates as riparian proprietors, and that they do not belong to the Territory of New Mexico, and, therefore, the Legislature has no more power to make a valid grant of them in the absence of legislation by Congress authorizing such grant than it would have to make a like grant of any portion of the public lands belonging to the government.

The fact that there are no public lands in the immediate vicinity of the canal is not only not controlling, but is not important; the United States are the owners of great bodies of land which may be irrigated with the waters of the Rio Grande, and to the extent that those waters are lawfully appropriated by appellee, the ability of the government to dispose of its lands, whether they lie above or below the canal, is impaired, for the reason that the purchaser from the government must acquire his right to water subject to all valid prior rights whether initiated above or below him on the stream.

Appellants and their associates are the owners of lands riparian to the Rio Grande, and as such have well-defined rights to the waters which appellee is seeking to divert and appropriate. They do not question the applicability of the doctrine of prior appropriation, in the determination of all controversies respecting rights to the use of water, for purposes of irrigation, in New Mexico. They claim, however, that the right of the riparian proprietor is superior to every other right than

that acquired by lawful prior appropriation, and insist that appellee is not authorized by law, and cannot be authorized by law to make such lawful appropriation; in other words, appellants resist any interference by appellee with their rights as riparian proprietors, and also claim the right to enlarge their present appropriation of water as their necessities may require free from such interference. They insist that water for the purposes of irrigation becomes, when applied to land, appurtenant to the land to which it is applied, and that any attempt to substantially change the application of the water necessarily results in the loss of the right to use it.

If appellee, not being the owner of any lands, may lawfully divert the surplus waters of the Rio Grande and sell the same to whomever will buy them, it must be because such waters in the control of appellee are a mere commercial commodity subject to constant change in the place of application, and do not become appurtenant to any land by virtue of use upon it.

There is a very important difference between the nature of the uses of water, and consequently, between the rights of those who appropriate water for its power as in hydraulic mining, and those who appropriate it for purposes of irrigation, but some of the early cases appear to treat the rights of all appropriators, whether for mining, manufacturing, or for irrigating purposes, as completely analogous.

If the policy of the government as evidenced by the legislation of Congress is not to be defeated, the difference in the nature of these uses, and of the rights of the users, must not be lost sight of.

For mining, the use of water is strictly mechanical. It is mechanically applied for its power, and as each

cubic yard of earth is subjected to this mechanical process of hydraulic mining, the purpose of that process has been served, and the mechanical power of the water is applied to the next cubic yard, and so on, until the entire field has been subjected to the process, and the use of water for that particular purpose in that particular locality has ceased to be beneficial. From this it follows that the appropriation of water for mining purposes necessarily involves the idea of a constantly changing place of use. Without the right thus to change the place of use, the right of appropriation for mining purposes would be of little value.

The use of water for irrigation, on the contrary, involves the idea of its constant application, year after year, to the same tract of land. The use is not in any sense a mechanical one. The element of force or power does not concern the irrigator of land except to the mere extent that it serves to convey the water to him. That is, by the force of gravity, water will deliver itself from a source higher in elevation than a point at which its use is desired, to that point.

Therefore, the analogy between the rights of one who has appropriated water for mining, and one who has appropriated water for irrigation completely fails when we come to consider whether the use of water thus appropriated may be changed.

The policy of the general government has been to encourage hydraulic mining, and to accomplish this, it is absolutely necessary that the miner should have the right to change the application of the water, as has been shown. To deny him this right is to defeat rather than to encourage mining enterprises. The authorities are quite uniform as to the right to change the place of

use of water appropriated for mining purposes. In an early California case the Supreme Court of that State said:

> "The next question that arises in this case is, whether a party who makes a prior appropriation of water can change the place of its use, without losing that priority as against those whose rights have attached before the change. This question, we think, can admit of but one answer. It would seem clear that a mere change in the use of water, from one mining locality to another, by the extension of the ditch, or by the construction of branches of the same ditch, would by no means affect the prior right of the party. *It would destroy the utility of such works were any other rule adopted.* As to the question whether a party can change the use of the water from one purpose to another, without affecting his prior right, we express no opinion, as the point does not arise in this case."
> (*Macris v. Bicknell*, 7 *Cal.* 264.)

There appears to have been no departure from the rule here enunciated by the courts of any of the Pacific States and Territories, but at least one court, the Supreme Court of Colorado, has refused to recognize the distinction insisted on by appellants, and holds that the rule is applicable to every appropriation of water, whether for mining, manufacturing or irrigation. That court distinctly refuses its assent to appellants' contention.

> *Strickler v. City of Colorado Springs*, 26 *Pac. Rep.* 313.

There are dicta in later California cases which indicate a leaning by that court in the same direction, but the question has not been distinctly passed on in California.

The United States Circuit Court for the District of Nevada has said:

> "A party having obtained the prior right to the use of a given quantity of water, is not restricted in such right to the use or place to which it was first applied. It is well settled that a person entitled to a given quantity of the water of a stream may take the same at any point on the stream, and may change the point of diversion at pleasure, and may also change the character of its use, if the rights of others be not affected thereby."
>
> *Union Mill. and M. Co. v Dangberg, 81 Fed. 115.*

The question did not necessarily arise in the case last cited, and the decision went upon other grounds. Of the numerous cases cited by the court in support of the proposition, only the Colorado case appears distinctly to decide the point. Appellants insist that the Colorado court attempts to support its conclusion by reasoning founded in common-law principles which have no application to water rights in the arid region.

These courts appear to lose sight of the fact that the waters, the right to the use of which is conferred by law, are public waters, and that the right is conferred in pursuance of a well-established policy which these decisions have a direct tendency to defeat.

The policy of the general government from the time of the acquisition of this arid region has been to encourage agriculture, and to effectuate this policy, the right to change the place of application of water, appropriated for this purpose, must be denied. To illustrate: The desert land act provides that a citizen of the United States may settle upon and acquire a title to 320 acres of land, upon condition that he will reclaim it from its

desert character by the application to it of water. A nominal price is affixed to the land, and license is given to appropriate any waters of the public streams for the purpose of reclamation and cultivation. The desire of the government to have these lands reclaimed lies at the foundation of its liberality to settlers.

To say that the water so appropriated for the reclamation and cultivation of that land, is not appurtenant to it, is to make possible a direct fraud upon the government and to defeat its manifest purpose. This is easily demonstrable. Suppose that in a stream in the territory there is a volume of water flowing, sufficient to irrigate 320 acres of land and no more. "A" locates 320 acres of land, diverts this water and appropriates it to the reclamation of that land. He then in due course of time, prescribed by the statute, makes proof and obtains a patent from the government. His right to appropriate the water depends on his possession of the land, and his right to the possession of the land depends upon the existence of the water necessary to reclaim it. Neither right can exist alone, and with the loss of one the other fails.

It seems illogical to say that rights to land and water thus acquired are separable, and that the settler may, as soon as he has acquired an indefeasible title to the land, and the right to use the water for its reclamation, segregate the water from the land, and sell the right to use it to another, who may acquire a title to another 320 acres of land from the government by applying the same water to it; a process which may be indefinitely repeated until any quantity of land may be thus acquired, upon a water supply sufficient only for the reclamation and cultivation of 320 acres of land.

Why should the government require a settler to "ex-

hibit a plan showing the mode of the contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation," if the water right may be segregated from the land and transferred to enable another to obtain title to other lands from the government in direct violation of the spirit and intent of the act under which title is acquired. Can it be imagined that any plan of irrigation contemplating or disclosing a right to the use of water temporarily, or a right less than a permanent one, would be accepted by the government as a basis of title under the desert land act?

While the provisions of the desert land act afford convenient means of illustrating the contention of appellants, the reasoning by which this contention is maintained applies with equal force to the homestead and other public land laws.

It is obvious that the same waters are the subject of legislation on the part of Congress and the Territorial Legislature, and that in case of conflict the territorial legislation must be held void. In the original brief (*p.* 92) appellants have attempted to show that there is nothing in the desert land act, as amended, from which it can be inferred that Congress has delegated to the Territorial Legislature authority to pass the act under which appellee is incorporated.

The act of July 26, 1866 (14 *Stat.* 253), compiled as section 2339 of the Revised Statutes, provided for the protection of "*rights to the use of water* for mining, agricultural, manufacturing and other purposes, only in cases where such rights *to the use* have become vested and are recognized and acknowledged by the local cus-

toms, laws and the decisions of the courts."

This language by no possible rule of construction can be made to include the right to divert water, and sell it as a commodity to whomever will buy it. There is no ambiguity about the language used by Congress, and the nature of the right intended to be protected is perfectly clear. Whether, as has been declared by this court, this legislation was the mere recognition of a pre-existing right, or whether it was a relinquishment of the rights of the government, amounting to a grant, it is entirely clear that a person (or corporation) invoking the protection of this legislation, must, in order to be within its provisions, establish the following proposition: *(a)* that by priority of possession he (or it) has acquired *rights to the use of water* for mining, agricultural, manufacturing or other purposes; *(b)* that such rights have vested and accrued; and *(c)* that such rights are recognized and acknowledged by the local customs, laws and decisions of the courts.

Appellee has not established, and the findings of the courts below, do not establish any one of these three conditions, and, therefore, the further consideration of this act becomes unnecessary.

Counsel for appellee claims in his brief that "Congress has expressly authorized territorial legislatures to create corporations by general laws for purposes of irrigation." He quotes section 1889 R. S., and says: "It would be impossible for the corporations authorized by this section to accomplish the objects of their creation, unless vested with the right to condemn property whenever the use to which it is put is a public purpose." (*Brief, p.* 6.)

Sec. 1889, *Rev. Stat. U. S.* as amended by the acts of June 8th, 1878 (20 *Stat. L., p.* 101), of July 30th,

1886 (24 *Stat. L. p.* 170), and of July 19th, 1888 (25 *Stat. L. p. 336.)* while specifically authorizing the creation of corporations for "the construction or operation of * * * irrigation ditches, and the colonization and improvement of lands in connection therewith," does not authorize the creation of such corporations with the power to divert and sell waters to whomever will buy them.

Congress has not authorized the creation of corporations for the construction or operation of irrigating ditches for the sale of water for speculative purposes, but only in connection with the colonization and improvement of land.

Perhaps it is true that the language of section 1889 as amended, standing alone, would give color to the contention of appellee, but it is certainly true that, when taken in connection with the other legislation of Congress on the same subject, and considered in the light of the settled policy of Congress, to prevent the monopoly of water supply, it becomes clear that the true construction is as contended for by appellants.

If this is the true construction of this section, as amended, the act of the Territorial Legislature is wholly unauthorized, and this case is clearly within the principles laid down by this court in numerous cases, notably, the case of *Lewis v. Pima County*, in which certain bonds of the County of Pima in the Territory of Arizona were held, by this court, to be void because issued under an act of the Legislature of Arizona, which is in violation of the restrictions of this legislation by Congress.

In the Pima County case bonds were issued, in aid of a railroad, as required and directed by a mandatory act of the Territorial Legislature, and Mr. Justice

Brown, speaking for this court, said:

> "The question is too clear for extended argument. By the 'internal affairs' of a municipal corporation, in the administration of which the Legislature could alone authorize it to incur a debt, was undoubtedly intended such business as municipalities of like character are usually required to engage in to fulfill their proper functions, and to effectuate the object of their charters. In the case of counties these are ordinarily to provide a court-house for the administration of justice; a jail for the confinement of prisoners; a poor-house for the sustenance of paupers (where by local law they are made chargeable upon the county); offices for the various officials of the county; and, under certain circumstances, highways and bridges for the accommodation of the public. It could never have been contemplated, however, that this power would be used to incur obligations in favor of a railroad operated by a private corporation for private gain, though also subserving a public purpose. The record before us does not show whether this railroad was designed to extend beyond the limits of the county; but if the county had power to issue its bonds in aid of railroads at all, there is nothing to indicate that such power was restricted to such roads as were wholly within the county, and if this act were a valid exercise of the authority of the Legislature, the credit of the county might be indefinitely pledged for the construction of railways extending far beyond the county limits, and, indeed, for carrying out any such schemes of public improvement as the Legislature could be persuaded to authorize. Clearly such debts would not be incurred in the administration of the internal affairs of the county."

Lewis vs. Pima County, 155 U. S. 57.

Another case is that of *United States v. McMillan*, 165 *U. S.* 504, in which this court held a fee bill enacted by the Legislature of the Territory of Utah for the purpose of fixing the compensation of clerks of the District Courts in that Territory to be in conflict with the legislation of Congress upon the same subject in so far as the clerks were authorized to retain to their own use moneys collected under the territorial fee bill, instead of paying the excess of all fees and emoluments received by them, under both statutes, into the treasury of the United States. As a result of this decision, Congress amended the existing law. (2 *Sup. R. S. No.* 8, *p.* 880.)

In *Clayton v. Utah*, 132 *U. S.* 632, an act of the Legislative Assembly of the Territory of Utah providing for the election of a territorial auditor by the people was held to be, as to that provision, in conflict with the organic act and void.

Mr. Justice Miller, delivering the opinion of this court, said:

> "It is true that in a case of doubtful construction the long acquiescence of Congress and the general government may be resorted to as some evidence of the proper construction, or of the validity, of a law. This principle is more applicable to questions relating to the construction of a statute than to matters which go to the power of the Legislature to enact it. At all events, it can hardly be admitted as a general proposition that under the power of Congress reserved in the organic acts of the Territories to annul the acts of their Legislatures the absence of any action by Congress is to be construed to be a recognition of the power of the Legislature to pass laws in conflict with the act of Congress under which they were created. * * * * *

> We do not think that the acquiescence of the people, or of the Legislature of Utah, or of any of its officers, in the mode for appointing the auditor of public accounts, is sufficient to do away with the clear requirements of the organic act on that subject."

Unless it can be established that Congress has delegated to the Legislatures of the Territories unlimited authority and control over the public waters within their respective territories, the vital test of the validity of territorial legislation affecting such waters must be, is it consistent with the legislation of Congress?

Unless Congress has expressly, or by necessary implication, sanctioned the control of water for purposes of irrigation by corporations having no interest in the lands to be irrigated, the attempt by the Legislature of New Mexico to authorize the creation of corporations to own and control waters in the manner which the courts below have held the appellee may do, must be held to be not within the power of the Territorial Legislature. That Congress has authorized the Legislative Assemblies of the several Territories by general incorporation acts to permit persons to associate themselves together as bodies corporate "for the construction or operaton of * * * * * irrigating ditches and the colonization and improvement of lands in connection therewith," is but evidence of the general policy of Congress insisted upon by appellants, but it is impossible to derive from such authorization power to create corporations designed and intended to monopolize the public water supply, and to control the same for purely speculative purposes.

If there are surplus and unappropriated waters in the Rio Grande, the policy of Congress, and every consideration of justice demand that those waters shall con-

tinue to flow in the stream as they have been accustomed to flow, until such time as the owners of lands see fit to divert and appropriate them for purposes of irrigation, or until such time as they may be diverted and appropriated for mining or manufacturing purposes, by persons or corporations desiring to make a beneficial use of them. They cannot without violating the laws of Congress be made the subject of private speculation by a corporation such as appellee, which would divert them and sell them for profit to whomever would buy.

Appellants beg to repeat the citation of cases in which this court has held territorial legislation invalid because in conflict or inconsistent with the legislation of Congress.

Ferris v. Higley, 20 *Wall* 375.
Lewis v. Pima County, *155 U. S.*, *57*.
Clayton v. Utah, 132 *U. S.* 632.
U. S. v. McMillan, 165 *U. S.* 504.

III.

While the proposition is not distinctly stated, it seems to be the contention of counsel for appellee that the doctrine of prior appropriation, as established in the arid region, completely supersedes all riparian rights. He says in his brief:

> "It would seem that appellants are basing their contention upon the theory that the common law in this respect obtains, although the proposition is not definitely stated. Many of the authorities cited in the brief are from states where the common law in that particular prevails. It is, of course, important in this case. If the law of prior appropriation prevails, and we insist that it does, the appellee has the right to divert surplus water from the river. The Legislature could confer upon it the power to do so,

provided the diversion was for a public purpose, and a beneficial use was made of the water." (*Brief, p.* 13.)

The doctrine of prior appropriation was not called into being by the influx of Americans into California and Nevada occasioned by the discovery of gold in those states. While the enormous importance of water as an agency in mining gold was then first demonstrated and new questions were presented for solution by reason of this importance, it is yet true that the doctrine of prior appropriation of waters, for purposes of irrigation, has existed for centuries, and riparian rights subordinate to, but contemporaneous with, the right of prior appropriation, have been recognized during all that time.

The doctrine of prior appropriation, as it prevails in the Pacific States and Territories, is well stated by Judge Hawley as follows

> "The truth is that under the principles of the common law in relation to riparian rights, if applicable to our circumstances and conditions, there must be allowed to all, of that which is common, a reasonable use. But, if prior appropriation is to prevail, then different rules must be applied. Under the principles of prior appropriation, the law is well settled that the right to water flowing in the public streams may be acquired by an actual appropriation of the water for beneficial use; that, if it is used for irrigation, the appropriator is only entitled to the amount of water that is necessary to irrigate his land, by making a reasonable use of the water; that the object had in view at the time of the appropriation and diversion of the water is to be considered in connection with the extent and right of appropriation; that, if the capacity of the flume, ditch, canal or other aqueduct, by means of which the water is conducted, is of

greater capacity than is necessary to irrigate the lands of the appropriator, he will be restricted to the quantity of water needed for the purpose of irrigation, for watering his stock, and for domestic use; that the same rule applies to an appropriation made for any other beneficial use or purpose; that no person can, by virtue of his appropriation, acquire a right to any more water than is necessary for the purpose of his appropriation; that if the water is used for the purpose of irrigating lands owned by the appropriator, the right is not confined to the amount of water used at the time the appropriation is made; that the appropriator is entitled, not only to his needs and necessities at that time, but to such other and further amount of water within the capacity of his ditch, as would be required for future improvement and extended cultivation of his lands, if the right is otherwise kept up; that the intention of the appropriator, his object and purpose in making the appropriation, his acts and conduct in regard thereto, the quantity and character of land owned by him, his necessities, ability and surroundings, must be considered by the courts, in connection with the extent of his actual appropriation and use, in determining and defining his rights; that the mere act of commencing a ditch with the avowed intention of appropriating a given quantity of water from a stream gives no right to the water unless this purpose and intention are carried out by the reasonable, diligent, and effectual prosecution of the work to the final completion of the ditch, and diversion of the water to some beneficial use; *that the right acquired by the appropriator must be exercised with reference to the general condition of the country and the necessities of the community, and measured in its extent by the actual needs of the particular purpose for which the appropriation is made, and not for the purpose of obtaining a monopoly of*

> *the water*, so as to prevent its use for a beneficial purpose by other persons; that the diversion of the water ripens into a valid appropriation only where it is utilized by the appropriator for a beneficial use; that the surplus or waste water of a stream may be appropriated, subject to the rights of prior appropriators, and such an appropriator is entitled to use all such waters; that, in controversies between prior and subsequent appropriators of water, the question generally is whether the use and enjoyment of the water for the purpose for which the water is applied by the prior appropriator have been in any manner impaired by the acts of the subsequent appropriator."
>
> *Union M. & M. Co. v. Danberg, 81 Feb. 94-5.*

The doctrine as thus stated seems to be an enlargement, out of the doctrine as it was known to the Spanish law. The difference is no greater than we should expect to find when we consider that it was the application of an old doctrine to new conditions. So far, however, as the reports of decided cases disclose, even in California, from the earliest time of its application to mining conditions there, it was never invoked to destroy or impair vested rights. Riparian rights yielded to the right of prior appropriation, in case of a conflict between the two rights, as to the surplus water of a stream, but nothing less than a valid appropriation was permitted to disturb or interfere with the right of a riparian proprietor.

> "The Superior Court did not err in enjoining the plaintiffs from diverting the whole amount of water appropriated by them for purposes of irrigation at times when it is found they could not use it beneficially for that purpose, and when, as a necessary consequence, it would run to waste on non-riparian lands. The extent of an appro-

> priation is limited not by the quantity of water diverted, but by the quantity which is, or which may be, applied by the appropriator to a beneficial use; and as to any surplus the riparian proprietor below the point of diversion has a right to demand that it should flow in the stream as it has been accustomed to flow."
> *Barrows v. Fox, 98 Cal. 66.*

The Supreme Court of California has rigidly administered the common law doctrine of riparian rights, but the same court as rigidly protects the rights of appropriators of public waters where such rights were acquired under the public land laws of the United States, before the lands through which the waters ran had passed to private ownership, or while the lands remained the property of the State, and waters were appropriated under the provisions of State laws. The case of *Lux v. Haggin*, 69 *Cal.* 255, contains a luminous discussion of the entire subject.

In the case at bar it seems to be contended by counsel for appellee that the laws of the United States relating to the public domain have no application to this controversy. He says in his brief:

> "It is to be presumed from the contention of appellants in this case that their title, if any, came from Spain or Mexico. The appellants insist that they had vested rights in the land and water which are protected by the treaty of Guadalupe-Hidalgo against any right which the Legislature of New Mexico could confer upon the appellee to exercise the right of eminent domain or divert water. If this is true, these lands must have been private property at the time of making of the treaty and the laws of the United States applicable to the public domain can have no application." *(rief, p. 910.)*

Appellants contend that under the Spanish and Mex-

ican law, the waters of all rivers were public property to be administered and distributed for the use of the inhabitants of the country through which they ran; that the doctrine of riparian rights existed under those laws, but only in a limited and qualified way; that they were subject to be defeated by the appropriation of the waters of the river for beneficial uses. The riparian proprietor could not interfere with, or prevent the diversion of waters which were appropriated in accordance with established customs, but to accomplish such appropriation, and override the rights of the riparian proprietor, application of the water to a beneficial use was essential. The rights which appellants seek to vindicate in this case, according to their contention, have existed for centuries, and if they understand the position of counsel for appellee it is, that the Legislature of the Territory of New Mexico may, by legislation initiated by it, without the express authority of Congress, destroy those rights. If the contention that the laws of the United States have no application, is well founded, it logically follows, in order to sustain this legislation, that the Legislature has power to deprive appellants of rights which are, in effect, conceded to have existed prior to the treaty of Guadalupe-Hidalgo.

In the original brief appellants have attempted to show by reference to Escriche, and to Hall's Mexican Law, the general nature of these rights. They beg now to submit some quotations from Hall's Mexican Law in support of their contention that as riparian proprietors they have a right to the water which is sought to be controlled by appellee.

> "A riparian proprietor can alienate the right to take water by renunciation, cession, sale, or in any other manner, in favor of the proprietor of the other side or the lower proprietor; and if,

holding two estates, he gives one away, he may reserve the exclusive right of using the water for that which he preserves, or to concede it for that which he alienates. A riparian owner can likewise acquire with respect to another the exclusive right to the water by means of prescription."

(*Hall's Mexican Law, Sec.* 1396.)

"A riparian owner cannot, without the consent of the other riparian owners interested, concede to a third party, to the injury of the former, the power to take water in the same current or on his estate; nor use himself the water to irrigate other lands which belong to him, but which are not situated on the same bank; although this right may be acquired by prescription. When one riparian estate is divided between co-owners or joint owners, so that the parts which are designed or adjudicated to some of them, and which form now so many other estates not bounded by the stream, both preserve notwithstanding their right to the water in the same form which they held it before the division, although nothing should have been stipulated on this matter." (*Id.* 1397.)

If these lands and waters were private property at the time of the ratification of the treaty, no legislation by the Legislature of New Mexico could impair the rights of the owners of that property. Under our system of government the right to acquire private property by appropriation cannot be conferred. Legislation attempting to confer the right to divert these waters can be defended only upon the theory that the waters are not private property, but are subject to public control. They can be held to be subject to public control on one or the other of two grounds, and not otherwise: First, because they were subject to public control under the laws of Mexico and Spain, and the United States have

succeeded to all the sovereign powers of Mexico, which had succeeded to the powers of Spain; or, second, because the United States own the lands through which they run, and ownership of the lands carries with it ownership of the waters.

Is there any other ground upon which the right to legislate with reference to these waters can be based? Appellants insist that there is not, and that their contention that the Spanish and Mexican laws control, must be accepted, or the principles laid down by this court in the case of *Sturr v. Beck*, must be applied. The Chief Justice, speaking for the court in that case, said:

> "The 9th section of the act of 1886 is referred to by Mr. Justice Field in Atchison v. Peterson, 20 Wall 507-512, and in the opinion it is said that 'the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common law doctrine of riparian proprietorship with respect to the waters of those streams.' When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded. As the riparian owner has the right to have the water flow 'ut currere solebat', undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect."
> (*Sturr v. Beck*, 133 *U. S.* 551.)

Appellants are not contending for the rule of the common law, with reference to riparian rights. They insist upon the rule of the civil law, which was the law of Mexico, under which as they understand it these

waters could not be granted away for purposes of speculation and pecuniary profit, under which their right to have these waters flow as they were wont to flow can be interfered with only by an appropriator who seeks to make a beneficial use of them.

Appellants insist that in the valley of the Rio Grande the rule has always been that water once appropriated to the irrigation of land becomes appurtenant to that land, in such way that it cannot be segregated from it except by restoration to the common mass, to be again subject to be appropriated in accordance with the requirements of the law. They assert with some degree of positiveness that no recorded instance can be found during the centuries in which irrigation has been practiced in the valley of the Rio Grande of an attempt to segregate water from land by the sale or transfer of a water right separate and apart from the land to which it has been previously applied.

It is a matter of common knowledge that in the valley of the Rio Grande water rights pass by deed with the land to which the water has been applied, without special mention in the conveyance. This is a rule of such universal application that, so far as the writer has been able to ascertain, no case in which it was questioned has ever been before the courts of New Mexico. By statute in the State of California the same rule is established, but the provision of the code of that State on this subject is, in common with numerous other provisions, merely declaratory of existing rights. It is difficult, if not impossible, to reconcile the decisions of the Supreme Court of California upon this and analogous questions, but in a case decided in 1892, that court decided, and it appears not to have departed from the rule then laid down, that water would pass by conveyance

of land as appurtenant to it. The case to which reference is made was an extreme one, because the ditch through which the water was carried terminated a long distance from the land conveyed, and the water was taken from the termination of the ditch, across the adjacent land, partly without right, and partly under a revocable license. That court said:

> "Miller sold and conveyed the land, with the appurtenances, to plaintiff, May 3, 1886, and his interest in the ditch to defendant, March 14, 1887, plaintiff's deed being then on record. The water was necessary to the proper use of Miller's land. It is evident that the appropriation was made and the ditch constructed to bring the water there for that purpose, and for no other; and further, that through these means the water had been so brought and actually used upon the land for some years, and was being so used at the time of the conveyance to plaintiff.
>
> "Appellant concedes that had the ditch been continued by the parties to Miller's land, the water would have been appurtenant to it, but inasmuch as this ditch is more than half a mile away, and Miller has received his share of the water through Hurtt's land without any right at all, and through Crooker's by a license which may be retracted at any time, the water was not used on this land by right, and therefore did not and could not be appurtenant to it, under section 662 of the Civil Code, which reads: 'A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or water-course, or of a passage for light, air, or heat from or across the land of another.' But that which is claimed as an appurtenant here is not the easement of a right of way over the lands of Hurtt and Crooker, but the water right which undoubtedly did belong to Miller and was used by right

as an incident to his land. At the time of his conveyance he got the water through Crooker's ditch by his (Crooker's) consent. Hurtt had presumptively, at least, licensed this use of his land for Crooker's ditch. If so, he could not object that it was made to carry additional water, unless this increased the burden to his land; that is, made the ditch in some respect more injurious to his estate. It does not appear that it did so. He was then using the water by right within the claim of appellant. But, in my opinion, the vendor cannot raise the question as against his vendee. The water belonged to Miller by appropriation. It was acquired for use upon this land, and the land could not be so advantageously used without it. It had been, and at the time of the sale was, being so used by the vendor. It had become an adjunct to this land, and the vendor cannot raise the question that he had not an indefeasible title to the right of way."
(*Crooker v. Benton*, 93 *Cal.* 368-9.)

The idea that water could be appropriated for purposes of speculation and profit seems to be of very recent origin, but it has in the few years since it was first promulgated produced some astonishing results. Mr. Charles F. Lummis, of Los Angeles, Cal., a writer of recognized ability, commenting on facts disclosed by Bulletin 100, Department of Agriculture, office of Experiment Station, 1901, entitled "Irrigation Investigations in California," says:

"Every stream was over-appropriated, many times the total flow being usually claimed. In one of the northern valleys, where, at the utmost, the supply would suffice for 150,000 acres, enough water was 'appropriated' to irrigate over 200,000,000 acres. On the San Joaquin River the amount claimed was 172 times the normal flow. Similar abuses were found on every stream within the scope of the investigation. *

> * * * * * * * * * One man claimed 'the entire flow of the San Joaquin from its surface to the centre of the earth.' His point of diversion was 'immediately opposite a white oak tree on the right bank of the stream.' A man on the Los Angeles served notice that he appropriated '3,000 miners' inches under a 4-inch pressure, to be taken out in a pipe one and one half inches in diameter."

The information contained in this bulletin No. 100 is of the greatest value, not only for the store of facts not otherwise obtainable, but for the observations of Prof. Mead as well.

The practical application of scientific knowledge to the business of irrigation is the need of the hour in the arid West. Upon it depends the future of a great empire. At present there exists no serious obstacle to the establishment, in New Mexico at least, of the doctrine for which appellants contend; which may be said to be the doctrine of public control (and to forbid private control) of the water supply. So far as is known to the writer, there is not in the entire Territory of New Mexico a single canal which was constructed upon the theory for which appellee contends; not a canal which does not belong to the owners of the lands irrigated from it, or the owners of which did not originally own the lands it was intended to irrigate; in other words, that there is not a canal constructed by a corporation under the provisions of the act of 1887, which claims the rights which the courts below have adjudged to the appellee in this case, unless it be the proposed canal of the Rio Grande Dam and Irrigation Co., the rights of which latter company are at present the subject of litigation in this court.

It is proper to state that none of the questions insisted on by appellants in this case are raised in the

case last referred to.

While this court will, of course, administer the law as it finds it to be, appellants respectfully urge that the claims of appellee should not commend themselves to this court in the absence of controlling legal principles supporting them. If the right to divert water for purposes of irrigation may be conferred on persons or corporations not interested in the cultivation of the soil, it will be but a short time until canal companies will control our agriculture with the same results which attend such a condition in other countries.

Prof. Mead says:

> "Spanish water laws are the outcome of a thousand years' experience, in which local customs widely different in character have long operated side by side in different districts of the same province. There has been time enough to work out to a final result the influence of different doctrines of water ownership. In Valencia, the most beautiful and prosperous irrigated section of Spain, the works date back to the Moors. Water rights are founded on customs which are older than records. Water and land are inseparable. Every writer who has studied the subject is of the opinion that the thrift, the skill, and success shown by farmers come from the peace and security which goes with the control of both elements of production. In the same province the results of the separate ownership of water and land are as completely manifest. In the district of Elche water was originally controlled by the land owners, but land and water were not inseparable. Gradually water rights were brought up by outsiders. Now the farmer buys water from these owners of streams just as he does fertilizers. The water tolls have been raised, farmers impoverished, and all progress and prosperity banished. In the province of Mercia water is attached to the land and farmers

> are prosperous. In Lorca land and water are separated, and the result, says a recent report, is 'large profits for the water owners, poor farmers, and languishing agriculture.' "

The Royal Commission on Water Supply, appointed by the government of Victoria, in Australia, studied water history in three countries of Europe with this result:

> "Italian experience, French experience and Spanish experience all go to show that the interests to be studied in relation to irrigation schemes are so many and so various, and so intimately bound up with the public welfare, that State control is imperatively necessary, and that for the protection of its citizens no monopoly can be permitted which would separate property in water from property in the land to which it is applied."

All of which is respectfully submitted,

NEILL B. FIELD,
Counsel for Appellants.